

JAMES R. SEBASTIAN ET AL.

IBLA 97-552, 97-568, 97-569, 97-570

Decided October 22, 1998

Appeals from a decision to implement the Castle Peak Travel Management Plan issued by the Glenwood Springs Resource Area Manager, Bureau of Land Management, Colorado. CO-078-07-49.

IBLA 97-552 affirmed; IBLA 97-568, 97-569, and 97-570 are dismissed.

1. Administrative Procedure: Administrative Review-- Appeals: Jurisdiction--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land-Use Planning

A BLM decision implementing a travel management plan in the Castle Peak Planning Unit will be affirmed where BLM has articulated a reasoned analysis, adequately considered all relevant factors, including the impact to the environment, and otherwise diligently evaluated and regulated recreational motorized vehicles in order to reduce conflict between motorized recreation on the one hand, and nonmotorized recreation, wildlife habitat, and watershed values on the other.

2. Evidence: Burden of Proof--Rules of Practice: Appeals: Burden of Proof

Where an Appellant challenges a BLM decision implementing a travel management plan, he must show that such decision contains a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

APPEARANCES: James R. Sebastian, pro se; Adam Mehlberg, pro se; Gerald Abboud, Executive Director, for Colorado Off-Highway Vehicle Coalition; Bill Shapley for Norm Mullen and the Colorado Environmental Coalition; Adena Cook for Blue Ribbon Coalition; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE TERRY

James R. Sebastian (IBLA 97-552), Adam Mehlberg (IBLA 97-568), the Colorado Off-Highway Vehicle Coalition (COHVCO) (IBLA 97-569) and the Blue Ribbon Coalition (Blue Ribbon) (IBLA 97-570) have filed appeals of a Decision Record (DR) for the Castle Peak Travel Management Plan, as outlined in Environmental Assessment CO-078-07-49, approved on August 8, 1997, by the Glenwood Springs Resource Area Manager, Bureau of Land Management (BLM), Colorado. The Colorado Environmental Coalition has filed a request to intervene in the appeal of Adam Mehlberg (IBLA 97-568).

We turn at the outset to a procedural issue. Counsel for BLM challenges the timeliness of the filing of three of the appeals. The Area Manager's August 8, 1997, Decision notifies the public that if an appeal is taken, the notice of appeal must be filed in the Glenwood Springs Resource Area Office "within 30 days from receipt of this decision." Counsel for BLM states that on August 14, 1997, a newspaper notice was published stating that appeals must be filed no later than September 15, 1997. Counsel suggests that the appeals of Mehlberg, COHVCO and the Blue Ribbon Coalition were untimely filed. Counsel states that the envelopes bearing these appeals had postage affixed by a meter dated September 15, 1997, but all were postmarked on September 16, 1997, and should be dismissed under 43 C.F.R. § 4.411(a).

Under Departmental regulation 43 C.F.R. § 4.411(c), the timely filing of a notice of appeal, within 30 days of receipt of the decision under appeal, is a jurisdictional requirement and the failure to file timely precludes consideration of an appeal. Ahtna, Inc., 100 IBLA 7, 15 (1987); TCG May 1983, 94 IBLA 22, 23 (1986); Oscar Mineral Group #3, 87 IBLA 48, 49 (1985).

If the notice of appeal is filed after the 10-day grace period provided in 43 C.F.R. § 4.401(a), the notice of appeal cannot initiate an appeal. If the notice of appeal is filed during the 10-day grace period, the delay in filing will be waived if it is determined that the notice was transmitted or probably transmitted before the end of the filing period. 43 C.F.R. § 4.401(a). See Ilean Landis, 49 IBLA 59, 62 (1980). The grace period applies only if the notice of appeal was "transmitted or probably transmitted to the office in which the filing was required before the end of the period in which it was required to be filed." Thus, the appeal must have been postmarked by September 15, 1997.

The Board has before it the envelopes in which Mehlberg, COHVCO and Blue Ribbon filed their appeals with the Glenwood Springs Area Office. All three of those envelopes are postmarked September 16, 1997. The filing in that office is controlling for determining whether an appeal is timely. 43 C.F.R. 4.411(a). Since the envelopes in which the notices of appeal were filed were not filed within the authorized filing period, i.e.,

September 15, 1997, the appeal of Mehlberg (IBLA 97-568), COHVCO (IBLA 97-569), and Blue Ribbon (IBLA 97-570) must be dismissed. In addition, the Answer of Intervenor Colorado Environmental Coalition in the appeal of Mehlberg (IBLA 97-568), now dismissed, may not be considered.

The Castle Peak Travel Management Plan (Final Plan) was developed because of increasing visitor use of the Castle Peak area. The plan identifies a series of travel designations updating obsolete motorized use restrictions in view of the changing demands made on the public lands by increased use of recreational vehicles, changes in off-highway vehicle technology (OHV), and increased public interest in this type of recreation. The Final Plan seeks to strike a balance between the public interest in enjoying this type of recreation with the need to protect soils, scenic views, wilderness and solitude values, sensitive watersheds and critical habitats.

The Final Plan (p. 3) states that BLM roads and trails are open to both motorized and nonmotorized visitor access to public lands. However, discretionary restrictions, if needed to protect public health and safety, or preserve natural resources, are implemented through OHV restrictions, closures, barriers, alternate routes, and visitor information.

The DR includes a Plan Summary (Attachment 1) which describes the BLM preferred alternative (Alternative 5) "to increase opportunities for non-motorized recreation and reduce conflicts between motorized travel, important wildlife habitat, and watershed values." The Plan Summary specifies that motorized travel will be permitted on designated routes on 92,144 acres, and on 176 miles of BLM roads. Approximately 144 miles of BLM routes will be available for nonmotorized travel only. The Plan Summary specifies seasonal motorized use restrictions to protect environmental values. It permits maximized motorized travel opportunities on designated routes in special Recreation Management Areas. (Attachment 1 at 1.)

The Plan Summary incorporates 6 changes affecting various routes and one change in the monitoring. These changes are discussed in the DR.

James R. Sebastian's appeal is addressed to the "Big Alkali Creek Road" (DR, Change #4), and the "Cabin Gulch-Windy Gap areas \* \* \* in the heart of the big game winter range of the Castle Peak area." Sebastian, who desires this area be kept a nonmotorized hunting environment, urges that the "Cabin Gulch-Windy Point areas" should be limited "to non-motorized travel especially during the hunting seasons." Sebastian contends that the Final Plan is inconsistent with "the guidelines of the management plan and goals."

BLM answers that prohibition of motorized use of the Big Alkali Creek Road during hunting seasons agrees with one of the goals outlined in the Final Plan but points out that other goals and objectives favor permitting

travel along this route during the summer and fall months. BLM summarizes public comments and other data on which BLM based its decision to restrict, but not prohibit, motorized use along this route. See Answer at 3-4.

BLM notes that the Cabin Gulch-Windy Point area has historically been managed for motorized travel opportunities, that the Final Plan continues that policy with some restrictions, and that the area will in fact be seasonally closed to motorized travel to protect wintering wildlife. Moreover, BLM's monitoring plan provides for making adjustments to the Final Plan if necessary to ensure continuing resource protection. (Answer at 5-6.)

BLM also notes that the "displacement impact," i.e., Sebastian's inability to enjoy his particular type of recreation in a particular area, is addressed in the Final Plan, which discusses and evaluates the conflicts between motorized and nonmotorized recreationists, and their options to seek out alternate sites because of changes. (Answer at 5; Final Plan at 49.)

BLM notes that Changes #4 and 5 amount to a decrease in motorized routes of less than one half of 1 percent. BLM points out that the Final Plan was distributed for public review on May 16, 1997, and that it was partially the input received in the form of public comments which resulted in Changes #4 and 5. (Answer at 9-10.)

The DR (Change #4) states that a portion of the Upper Alkali Creek Route is within the "Conservationists" proposed wilderness area outside the Castle Peak Wilderness Study Area. According to policy directives issued by the Colorado State Director in May and June 1997, any new actions within the proposed wilderness area must not adversely affect the area's potential for wilderness character. In light of this policy, BLM will study and assess the wilderness qualities of the area. Consistent with the policy, the Area Manager "decided to defer planned improvements to the route, including road maintenance, and trailhead construction" pending completion of the evaluation.

The Area Manager stated that

the primary purpose for allowing motorized use along this route in the Final Plan was to provide camping opportunities, particularly during hunting seasons. However, recent field review of the route found it in a non-maintained condition. Permitting motorized use on this route without conducting at least a minimal amount of road maintenance could damage soils and watershed values. For this reason, it is my decision to allow motorized travel only to a new closure point outside the Conservationists' proposed wilderness area resulting in a loss of one mile of motorized travel. A barrier would be constructed

this fall. Until road improvements are made to address proper water drainage and soil stabilization, motorized travel beyond this new closure point could be harmful to resource values.

(DR, Change #4.)

In the DR, Change #5, the Area Manager stated that the "Poison and Picture Ridge Routes" would be managed as outlined in the Final Plan, except that closure points would have signs rather than mechanical devices. On these routes, too, maintenance would be deferred pending completion of wilderness review and travel would be allowed to continue to the closure points.

The Final Plan (p. 45) states that opportunities for nonmotorized hunting would be increased in the Windy Point area, among others, while vehicle access to most of the public lands during the big game hunting season would be available. The Final Plan states (p. 69) that all roads in the Windy Point area are covered by the OHV limitation restricting motorized travel to existing roads and trails, except for snowmobiles.

In the DR, Change #1, the Area Manager stated his decision to close "the last 3/4 mile of the route" from Highway 131 west towards Windy Point to motorized travel. This decision was based on an engineering review showing that flows from seeps and springs make part of the route impassible and that substantial investments would be required to make the road passable for motorized vehicles.

[1, 2] In reviewing a case in which a BLM action implementing a management plan is challenged, the Board looks to whether BLM has articulated a reasoned analysis, adequately considered all relevant factors including the impact on the environment, and whether its action conforms to applicable Federal statutes. The Board also looks to whether there has been a showing of compelling reasons for modification or reversal of the BLM action under appeal. See National Organization for River Sports, 140 IBLA 377, 387 (1997); Deschutes River Public Outfitters, 135 IBLA 233, 244 (1996).

While the case before us does not present a specific challenge to BLM's finding of no significant impact on the environment (FONSI), the burden of proof required to overturn a FONSI is operative here. That burden requires a challenging party to show that the proposed action was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See generally Upper Mohawk Community Council, 104 IBLA 382, 385-86 (1988); Glacier-Two Medicine Alliance, 88 IBLA 133, 140-41 (1985) and cases cited. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal. See generally Oregon Shores Conservation Coalition, 83 IBLA 1, 6 (1984).

Based on our review of the record, we conclude that BLM's Decision adopting the Final Castle Peak Travel Management Plan with the changes noted is based on a well-reasoned and well-supported analysis of the competing interests and its determination that an EIS is not required is appropriate.

There has been no demonstration of errors of fact or law in BLM's DR, implementing, with certain changes, the Final Plan. Changes #4 and 5, challenged on appeal, are fully supported by rationales which are not rendered invalid or erroneous by virtue of Appellants' disagreements. Thus, Sebastian's desire to impose more restrictive motorized traffic limitations, while understandable in view of his interests, cannot serve as a basis for disturbing BLM's determination in the absence of a showing that that determination is contrary to data developed in the environmental evaluation process or constitutes an arbitrary deviation from the Final Plan. Sebastian's broad allegation that the Final Plan is inconsistent with BLM's management goals for the area is unaccompanied by a citation of specific examples or supportive argument.

Similarly baseless are allegations that one commenter was excluded from the public comment process, and the charge that Change #4 was made to satisfy a whim of radical conservationists. First, a casual inspection of the files before the Board reveals that public participation in the decision-making process was not only vigorously solicited but also resulted in a filing of commentary and suggestions from diverse sectors of the public. The correspondence of record reveals that BLM officials seriously evaluated and utilized the written comments. The Final Plan devotes an entire chapter (Ch. 7, p. 64) to public involvement and summarizes highlights of public sentiments and opinions filed with BLM. BLM's public outreach included not only notification in local newspapers, but also the mailing of letters and questionnaires to over 1,400 people. (Final Plan at 65.)

Second, a fair reading of the DR and associated documents excludes any possibility that Change #4, or any other changes, for that matter, were implemented to satisfy the whim of any particular interest group. On the contrary, the changes were developed in response to public input and to various data suggesting that such changes were prudent and well-considered.

Finally, the Federal Land Policy and Management Act, 43 U.S.C. § 1701 (1994), does not guarantee to any member of the public "relaxation, release from the daily burdens of life and spiritual renewal" as one party has characterized this alleged entitlement. Rather, as articulated in the statute, the public lands are to be managed according to the concept of "multiple use" so that their resource values are utilized in the combination that will best meet the present and future needs of the people "making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions." 43 U.S.C. § 1702(c) (1994).

BLM's action herein is in harmony with this statutory formulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

